No. 16,322

United States Court of Appeals

For the Ninth Circuit

S. A. PETERS and TIMBER, INC., OF CALIFORNIA,

Appellants,

vs.

KAL W. LINES, Trustee in Bankruptcy of the Estate of Snow Camp Logging Co., Bankrupt,

Appellee.

APPELLANTS' OPENING BRIEF.

ARTHUR P. SHAPRO,
HUBER & GOODWIN,
L. W. WRIXON,
CHARLES M. STARK,
PAUL W. MCCOMISH,
1811 Mills Tower,
San Francisco 4, California,
Attorneys for Appellants.

Subject Index

Table of Authorities Cited

Statutes

Texts

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STATEMENT OF JURISDICTION.

On October 30, 1958, the U. S. District Court for the Northern District of California, made and entered herein its memorandum and order affirming the order, judgment and decree of March 25, 1958 entered by the referee in bankruptcy in this proceeding, which judgment was entered again appellants and in favor of appellee in the sum of $647,627.47 upon the objections of appellee to the proof of claim filed by appellants in the bankruptcy proceedings of Snow Camp Logging Co., a copartnership. (T.R. pp. 71-85.) This relief was granted by the referee and affirmed by the District Court upon the trustee's petition for an order

disallowing the claim in question and for judgment for affirmative relief. Notice of Appeal (T.R. pp. 85-86) was timely filed on November 19, 1958. (11 U.S.C.A. 48; Bankruptcy Act Section 25.) Jurisdiction of this Court to review the Order of the District Court is supported by Statute 11 U.S.C.A. 47. (Bankruptcy Act, Sec. 24.)

STATEMENT OF QUESTIONS PRESENTED.

The following are the questions presented on appeal to this Court:

1. Did the bankruptcy court have summary jurisdiction not only to hear but to grant the trustee's petition for affirmative relief against appellants? (T.R. pp. 31-33.)

2. Where the subject matter of the trustee's said petition for affirmative relief against appellants (hereinafter for brevity referred to as his "counterclaim") was clearly involved in a state court proceeding which was at issue and ready to be tried before the bankruptcy proceedings in question were commenced, was the bankruptcy court bound by comity to refrain from enjoining and to permit the state court action to proceed without interference from the bankruptcy court?

3. Can a trustee in bankruptcy maintain a counterclaim against a creditor of the bankrupt for damages for breach of a contract, which contract had been assigned before bankruptcy by the bankrupt to a corporation which was not a party to the bankruptcy proceedings?

4. Was there any anticipatory breach by the bankrupt of the contract for the alleged breach of which by appellants the trustee was granted judgment?

5. Was the amount of the damages awarded to appellee against appellants excessive and/or was it supported by competent credible evidence?

SPECIFICATION OF ERRORS.

The "Statement of Points on Appeal" filed herein (T.R. pp. 549-552) gives in detail the various points relied upon by appellants. They are as follows:

The United States District Court for the Northern District of California, Northern Division, erred:

(1) In affirming a finding of the referee in bankruptcy, that the bankrupt, Snow Camp Logging Company, a corporation, was the owner and is now the owner of any claim or cause of action against either S. A. Peters or Timber, Inc., of California, appellants herein.

(2) In affirming a finding by the referee in bankruptcy that there is even one scintilla of testimony or documentary proof in the record in support of the allegation made by the trustee for his order to show cause directed to appellants that the assignment by the bankrupt partnership to a corporation of the contract between appellants and the bankrupt was made without any consideration and that it remained as a valuable asset of the partnership and was not owned by the assignee corporation.

(3) When it affirmed the action by the referee in bankruptcy restraining an action pending in the Superior Court of the State of California, in and for the County of Humboldt, which action had long been pending at the time of the filing of the petition in bankruptcy and which related to the same subject matter as the trustee's objections to the claim of appellants.

(4) When it affirmed a finding of the referee in bankruptcy and held that there had been no accord and satisfaction between the bankrupt and appellants.

(5) When it affirmed the action of the referee in bankruptcy in overruling the objection to the jurisdiction of the bankruptcy court and refused to abate the proceedings in the bankruptcy court.

(6) When it affirmed the action of the referee in bankruptcy in refusing an offer of appellants to prove that the bankrupt partnership entered into a written contract to deliver gang logs elsewhere than to appellants, contrary to its contract.

As indicated in the transcript of record (pp. 364-382), a series of questions was asked of the bankrupt, Clarence C. Vander Jack, by counsel for appellants, with the obvious purpose of eliciting proof from the witness that, notwithstanding the provisions of trustee's Exhibit No. 1 (T.R. pp. 6-12) and particularly to paragraph No. 8 thereof:

> "8. Sellers shall have the right to sell logs of any type to other buyers of logs until buyer comes into full production upon *that type of log.* In the event buyer ceases production upon any type of

> log, or cuts back on production, sellers shall have the right to sell any of such logs as buyer does not require upon the open market and to other buyers," p. 8.

the bankrupt had, during the period July-October 21, 1953, contracted with and delivered logs to others than appellants in substantial quantities, and thus had itself breached the agreement of June 1, 1951. In particular, the referee improperly rejected the offer of appellants to introduce in evidence the "Memorandum of Agreement" (undated) between the bankrupt and Western Studs. This memorandum of agreement is set forth in haec verba in the record. (T.R. pp. 379-382.)

In view of the fact that the referee, without objection by appellee, permitted the following question to be asked of the same witness and the following answer given

> (T.R. p. 365—"Q. Did you have contracts with anybody else to sell them logs during this period of time?
>
> A. You brought that up in the deposition. I looked in my records, and *we did have.*" (Italics ours.)

We observe that, regardless of the grounds for objection thereafter urged on behalf of appellee to the subsequent questions asked of the witness by appellants, and to the introduction of the Western Studs agreement in evidence, the referee's rulings on this evidence and his rejection of the Western Studs agreement were not only erroneous but clearly prejudicial. We have,

therefore, in view of the length of the proceedings involved leading up to the final rejection of appellants' offer of proof (T.R. pp. 379-383) set forth "the full substance of the evidence rejected" in Appendix "A" hereof.

(7) When it affirmed the action of the referee in bankruptcy in sustaining an objection and refusing an offer of proof by appellants that the bankrupt corporation did in fact deliver substantial quantities of gang logs to other persons than appellants contrary to its contract.

(8) In affirming the amount of damages computed and awarded by the referee in bankruptcy against appellants.

(9) In affirming an award of damages made by said referee in bankruptcy in favor of appellee and against appellants in the sum of $674,627.40.

(10) In affirming a ruling by the referee in bankruptcy that the jurisdiction of the bankruptcy court was superior to that of the Superior Court of Humboldt County, where the jurisdiction of Humboldt Superior Court had attached prior to the filing of the petition in bankruptcy.

(11) In affirming the action of the referee in bankruptcy in ruling that comity did not compel the trustees to continue the State Court action which was first begun long prior to the filing of the petition in bankruptcy.

(12) In affirming the action of the referee in bankruptcy in enjoining appellants and appellants' attor-

neys from proceeding in the State Court action in Humboldt County.

(13) When it refused to vacate the ex parte orders dated March 26, 1958 and April 11, 1958 both obtained without notice to appellants.

(14) When it made its order dated October 30, 1958, affirming the judgment and decree of March 25, 1958 entered by the referee in bankruptcy in the above-entitled action for which appellants sought review.

STATEMENT OF PROCEEDINGS.

On or about June 1, 1951, Clarence Vander Jack and Clarence C. Vander Jack, partners doing business as Snow Camp Logging Company (hereinafter referred to as the "Bankrupt") as Sellers, entered into an agreement with appellant, S. A. Peters (Trustee's Exhibit No. 1, T.R. pp. 6-12), for the delivery by the bankrupt to appellant of logs. Thereafter, under the provisions of paragraph 12 of said agreement, appellant, S. A. Peters, assigned said agreement to appellant, Timber, Inc., a corporation. On December 14, 1953 "Snow Camp Logging Company, a corporation", as plaintiff, filed in the Superior Court of the State of California, in and for the County of Humboldt (No. 28851), a complaint for money due and for breach of the contract against appellants. This action was for the recovery of alleged damages in the sum of $1,045,493.39. On March 4, 1954, the appellants filed their answer and cross-complaint in said Superior

Court action. (T.R. p. 40; also, T.R. pp. 22-30.) On March 11, 1954, the answer of the plaintiff to said cross-complaint was filed and a memorandum of motion to set that Superior Court action was filed. (T.R. p. 40.) On February 14, 1955, the bankrupt filed its voluntary petition in bankruptcy as a partnership, together with the members of said partnership individually. On July 16, 1956, a substitution of attorneys for the plaintiff in said Superior Court action was filed whereby Messrs. Max H. Margolis and Frederick L. Hilger, the present attorneys for the trustee in bankruptcy and appellee herein, were made attorneys of record for the plaintiff in that action, and on the same day the plaintiff demanded a jury trial and jury fees were deposited with the clerk of that court. (T.R. p. 41.) On August 17, 1956, notice of time and place of trial was filed by said attorneys for the plaintiff fixing the trial for October 1, 1956 at Eureka, California, and on October 8, 1956 the action was reset for trial on November 26, 1956.

In the interim, and on January 11, 1956, appellants filed with the referee in bankruptcy their claim against the estate of the bankrupt for alleged damages in the sum of $900,000.00 by reason of the alleged breach by the bankrupts of the same agreement of June 1, 1951. (T.R. pp. 3-30.) Thereafter, and on October 3, 1956, the trustee in bankruptcy filed his "Petition for Order Disallowing Claim under Section 57d of the Bankruptcy Act" and for Judgment for Affirmative Relief (T.R. pp. 31-33) and the referee on said date issued his order to show cause to which appellants were re-

spondents (T.R. p. 34) which was returnable before the referee on November 7, 1956. On November 7, 1956, appellants filed with the referee their motion for order authorizing the withdrawal of their said proof of claim (T.R. pp. 37-38) and an affidavit in support thereof (T.R. pp. 35-37), and at the same time filed their return to said order to show cause, their motion to discharge same, and their plea in abatement. (T.R. pp. 39-43.) Appellants' motion to withdraw their proof of claim in question was denied by the referee on November 7, 1956, and thereafter, and on November 27, 1956, appellants filed their bill of particulars in support of the proof of claim in question. (T.R. pp. 43-44.)

The trustee's petition for order disallowing claim and for judgment for affirmative relief was heard by the referee in bankruptcy on November 7, December 5, and December 6, 1956, and on January 21 and 22, 1957. During the course of these proceedings and on December 6, 1956 upon the ex parte motion of the trusteee, without any prior notice, written or otherwise, to appellants, the referee restrained appellants from taking any further proceedings in the state court action and directed that all proceedings in connection with the trustee's counterclaim be litigated in the bankruptcy court in this summary fashion. Due objection to these rulings of the referee was made by appellants. (T.R. pp. 161-162.) After written argument of the cause (which was submitted for decision on January 22, 1957) the referee gave his notice of decision on February 24, 1958 (T.R. pp. 44-47) and on

March 22, 1958, the referee signed and filed his findings of fact and conclusions of law (T.R. pp. 47-55), and on March 25, 1958 entered his order, judgment and decree. (T.R. pp. 55-56). On March 28, 1958, appellants timely filed their petition for review of the referee's order, judgment and decree of March 25, 1958. On April 11, 1958, the District Court ordered writs of execution upon the judgment to be issued, over the objection of the appellants (T.R. pp. 66-68), and on June 18, 1958 the referee in bankruptcy filed with the District Court his certificate and report on the petition for review. (T.R. pp. 68-71.)

After due argument of the petition for review by counsel for the respective parties, on October 30, 1958, Hon. Sherrill Halbert, U.S. District Judge for the Northern District of California, by his memorandum and order (T.R. pp. 71-85) affirmed the referee's order, judgment and decree of March 25, 1958, and from this latter order this appeal has been perfected.

STATEMENT OF FACTS.

Under the agreement of June 1, 1951 between the bankrupt and appellants, appellants commenced construction of the "gang-type saw mill" before August 1, 1951 and completed it with reasonable diligence so that shortly thereafter the bankrupt commenced to deliver and appellants received and processed in their said gang mill substantial quantities of logs. This relationship continued until about October 21, 1953, at which time the bankrupt stopped delivering logs. During this whole period of time payments were promptly

made by appellants for all logs delivered by the bankrupt. However, beginning in July of 1953, a dispute arose between the bankrupt and appellants concerning the quality, use and the applicable price of the logs delivered to appellants by the bankrupt. Appellants made semi-monthly payments for the logs at the price considered by them to be proper for the quality of logs in question. Despite this dispute, the bankrupt accepted and cashed appellants' checks therefor, each of which bore the acknowledgment (by endorsement) that the check was "in full payment for logs delivered" during the two-weeks' period, in question. (Trustee's Exhibits Nos. 6-12, incl.) Appellants contended that the logs were not gang-type logs as described in paragraph 5 of the agreement of June 1, 1951 (T.R. p. 8) and that they were more than 40% defective. At all times from the opening of the mill to October 21, 1953, appellants' mill operated at full capacity and production, but continually objected to taking logs which were not of the quality specified in the contract.

During all of this same period of time, the bankrupt delivered 60% of its logs to others than appellants, including logs which, under the provisions of paragraphs 3 and 5 of the agreement (T.R. pp. 7-8), appellants were entitled to have delivered to them. Appellants were at all times ready, willing and able to perform their obligations under the agreement but, on and after October 21, 1953, the bankrupt stopped delivering logs and refused thereafter to do so. A controversy had also arisen between the parties during

the period between July and October, 1953 concerning the "jamming" of the log pond at appellants' mill Appellants did all they could to prevent such jamming, but the bankrupt continued to send truckloads of logs to the pond at so rapid a rate as to make it impossible to keep the pond from being jammed with logs.

After October 31, 1953, there were no further deliveries of logs under the agreement of June 1, 1951, and, after correspondence between the bankrupt, appellants, and their respective counsel, the suit for damages was filed by Snow Camp Logging Company, a corporation, on December 14, 1953, upon which the trustee's petition for affirmative relief (counterclaim) in this matter is predicated. (T.R. pp. 32-33.)

ARGUMENT.

I. THE BANKRUPTCY COURT DID NOT HAVE SUMMARY JURISDICTION TO HEAR THE TRUSTEE'S PETITION FOR AFFIRMATIVE RELIEF AND TO GRANT AFFIRMATIVE RELIEF AGAINST APPELLANTS.

As is indicated in the memorandum and order of the district judge (T.R. p. 72):

> "Before the date set for the hearing on the order to show cause, petitioners (Appellants) appeared specially to object to the jurisdiction of the bankruptcy court on the ground that there was then pending in the Superior Court of the State of California, in and for the County of Humboldt, an action entitled Snow Camp Logging Co., a corporation, plaintiff, vs. S. A. Peters and Timber Incorporated of California, defendants,

and that the subject matter of said action was the same as that embodied in the Trustee's petition for affirmative relief. This objection was overruled by the Referee."

This was not a preference action and, in addition to the foregoing objection appellants timely filed their motion for permission to withdraw their claim, upon similar grounds. We believe that the mere filing of the claim by appellants did not constitute such consent as would grant to the bankruptcy court the summary jurisdiction to hear, determine and award the affirmative judgment against appellants which was done by the referee. As also was observed by the district judge, this court "has not spoken directly on the matter". (T.R. p. 82.) The original inclination of this court in support of our opposition to any such implied consent to such summary jurisdiction is found in *In re Continental Producing Co.,* 261 F. 627; *In re Bowers,* 33 F. Supp. 965.

See also,

In re Gross, 121 F. Supp. 38;

B. F. Avery & Sons Co. v. Davis, 192 F. 2d 255 (5th Cir.) cert. den. 342 U.S. 945;

In re Tommie's Dine & Dance, 102 F. Supp. 627.

This position is also supported by the decisions in *In re Houston Seed Co.,* 122 F. Supp. 340; *Duda v. Sterling Mfg. Co.,* 178 F. 2d 428; 14 A. L. R. 2d 899.

See also,

Harrison v. Cumberland, 271 U.S. 191;

Cline v. Kaplan, 323 U.S. 197.

Under certain circumstances, the broad rule for which we contend has been limited by some courts to the extent that by the filing of the claim the claimant consented to a summary adjudication of a counterclaim, but not in an amount exceeding the claim. (i. e., that no affirmative relief may be granted.)

Metz v. Knobel, 21 F. 2d, 317;

In re Florsheim, 24 F. Supp. 991;

Fitch v. Richardson, 147 F. 197;

Whereas here, the sole basis of appellee's counterclaim was not any preferential or fraudulent transfer by the bankrupt to appellants, but, rather, amounted to an unliquidated claim for damages for an alleged breach of a contract (the status of which controversy in the state court, prior to bankruptcy, will hereafter be more fully discussed), we believe that the rule of the Fifth Circuit on this question should be followed by this court.

II. COMITY REQUIRED THAT THE BANKRUPTCY COURT SURRENDER JURISDICTION OVER THE SUBJECT MATTER OF THE TRUSTEE'S COUNTERCLAIM AGAINST APPELLANTS TO THE STATE SUPERIOR COURT.

a. **The subject matter was at issue, ready and set to be tried by the State Court on October 1, 1956; and**

b. **The injunction issued by the Referee against Appellants' proceeding with the State Court action on their claim and/or their defense of what is now the Trustee's counterclaim, was issued ex parte without notice to Appellants of the grounds for such motion for injunction and without an opportunity for Appellants to fully reply thereto.**

On the 14th day of December, 1953, the bankrupt's assignee filed an action against appellants in the Su-

perior Court for Humboldt County for damages for breach of the contract which is the subject matter of the litigation at bar. Appellants thereafter filed an answer and cross-complaint and the action was at issue. (Claimant's Exhibit No. 1 and T.R. p. 39.) On February 14, 1955 (T.R. p. 48), Snow Camp Logging Co. and its partners filed a voluntary petition in bankruptcy and appellee was appointed trustee of the estates of said bankrupts. Thereafter, the attorneys for appellee were substituted as attorneys of record for plaintiff in the Superior Court action. The plaintiff then demanded a jury trial and the matter was set for October 1, 1956 (T.R. p. 4) and later reset for November 26, 1956. (T.R. p. 41.)

In the interim, appellants filed their claim in the bankruptcy case arising from the same agreement of June 1, 1951. (T.R. pp. 3-30.) The trustee, on October 3, 1956, filed his petition for order disallowing claim and for affirmative relief (T.R. pp. 31-34) which was returnable before the referee on November 7, 1956. On this date, appellants filed with the referee their motion for order authorizing withdrawal of claim and their plea in abatement. (T.R. pp. 37-43.) Appellants' motion was denied and trial before the referee proceeded. At the end of the first day of trial on November 7, 1956, upon an oral ex parte motion, without notice of any kind to appellants and without any showing whatever, and over appellants' objection, the referee restrained appellants from proceeding further in the state court and directed that the proceedings in connection with trustee's counterclaim be litigated

in the bankruptcy court in a summary fashion. (T.R. pp. 161-162.)

The referee in refusing to allow appellants to proceed in the state court completely disregarded the principle of comity between the state and federal courts. This action deprived appellants of their right to have their cause tried in a plenary action before a jury. It forced them to submit to a summary trial on a counterclaim, title to which had passed from the bankrupt by assignment prior to the filing of the petition herein. (This phase will be more fully discussed subsequently in this brief.)

The bankruptcy court has no right to issue an injunction or restraining order arbitrarily and one will not be issued when good conscience will not require it. A showing must be made that to permit the state court action to continue would allow an interference with the due administration or jurisdiction of the bankruptcy court or that the pressing of the state court action would be irreparably injurious to the rights of the other parties. *Brehme v. Watson,* 9th Cir., 67 Fed. 2d, 359, wherein Judge Garrecht stated, in his opinion, at p. 361:

> "The authorities are agreed that the bankruptcy laws merely give to courts of bankruptcy full power to enjoin all persons within their full jurisdiction from doing any act that will interfere with or prevent its due administration, or injury to the parties, and not otherwise."

The court further points out the necessity for a showing to be made for the issuance of the restraining order.

"The question thus presents itself: Should this court, upon the filing of an involuntary petition in bankruptcy, *as* of course, and *without any allegation or proof of a threatened invasion of the rights* of any creditor, issue its injunction enjoining the further prosecution of a suit in a state court for a provable debt against the (alleged) bankrupt, because of the *mere possibility of action* being taken which will be *injurious* to the rights of *creditors,* and in the absence of an application to such state court for the proper relief therein? I cannot believe that such question should be answered in the affirmative."

Behind Judge Garrecht's decision just quoted is found a beautifully phrased decision, *In re: French,* 18 Fed. 2d, 792 (U.S.D.C. Montana) the following:

"The relation between the state and federal courts was clearly stated in the case of *Covell v. Heyman,* 111 U. S. 176, 182, 4 S. Ct. 355, 358; 28 L. Ed. 390, where it is said: 'The forbearance which courts of coordinate jurisdiction administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. It is a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior."

The court went on to say:

"There is another phase of the case which requires comment. The action here sought to be enjoined was instituted in the state court on September 15, 1923. On October 17, 1923 the defendant filed a plea of general issue with notices of special defenses. The bill of complaint for injunction was not filed in this court until December 7, 1925. Defendant having thereby submitted to the jurisdiction of the state court is entitled to a stay of proceedings by injunction by this court only upon showing clear and undoubted right thereto. He must now exhaust his limit in the state court. Should it then appear that the enforcement of any judgments which may be obtained against plaintiff will be contrary to the recognized principle of equity and the standards of good conscience or would have the effect of impairing the jurisdiction of this court, this court may then prevent that result by means of injunction. (citing cases). The restraining order heretofore issued will be and the same is hereby dissolved."

The same principle was announced in *Murphy, et al v. Bankers Commercial Corporation,* 203 F. 2d 645, U. S. Circuit Court of Appeals, 2d Circuit, April 6, 1953. A decision by Judge Augustus N. Hand which cites *Brehme v. Watson,* supra.

The restraining order issued by the referee was on oral motion and without notice. The record on this portion of the proceeding is as follows (T.R. pp. 161-162):

"Mr. Margolis. I would like to ask for an order at this time restraining counsel and the claim-

ants from proceeding, until this matter is determined before this Court, with any action in the Superior Court of Humboldt County, and in support of my motion I will call your Honor's attention to the case cited in claimant's memorandum which is on file. I believe it is in re Corcoran. This Court has the right, pending the determination of the matter . . .

The Referee. I don't think there is any question about that.

Mr. Stark. I do not think you are entitled to have an Order enjoining the Superior Court.

Mr. Margolis. I did not say the Superior Court. I said proceeding up there.

(Testimony of S. A. Peters)

Mr. Stark. The effect is the same. He is aware of the cases that hold your Honor hasn't jurisdiction to restrain the State Court.

The Referee. I understand that. I am going to restrain counsel and I am going to restrain the plaintiff from proceeding in the State Court until this is disposed of at least.

Mr. Stark. Don't you think we are entitled to a pleading?

The Referee. Not under the circumstances.

Mr. Goodwin. You mean we are not going to be restrained by a written order?

The Referee. I will give you a written order yes, if you want a written order.

Mr. Goodwin. We would prefer it.

The Referee. I will sign an order to that effect but the restraining order dates from this minute.

Mr. Margolis. That restraining order will remain in full force and effect until it is lifted by an order of this court?

The Referee. That is correct."

Thus, it will be seen that there was absolutely no showing of the interference or irreparable injury required by the courts as a basis for the issuance of such a restraining order.

III. THE FINDING OF THE DISTRICT COURT THAT THE BANKRUPT WAS, AT THE TIME OF THE COMMENCEMENT OF THE BANKRUPTCY PROCEEDINGS, THE OWNER OF THE RIGHTS AND PROPERTY IN THE AGREEMENT OF JUNE 1, 1951 IS NOT SUPPORTED BY THE EVIDENCE.

(Finding No. 19, T.R. p 52)

In order for the referee to give appellee any relief on his counterclaim, appellee was required to prove that he was entitled to have judgment. A counterclaim is in the nature of a complaint against appellants. All material allegations, not admitted, are deemed denied and must be proven. While it is true that a referee's findings and/or the findings of a district judge based on conflicting evidence would not generally be disturbed by this court on appeal, such rule would not apply to a finding based on no evidence whatsoever, or to an inference drawn from uncontradicted evidence.

Costello v. Fazio (9th Cir.) 256 F. 2d, 903;
In re Morasco (2nd Cir.) 233 F. 2d, 11/15;
Sheldon v. Waters (5th Cir.) 168 F. 2d, 927.

The record of the Superior Court proceedings (Claimant's Exhibit No. 1, printed as Exhibits B, C and D, T.R. pp. 13-30), reveals the following undisputed facts: The complaint filed therein (T.R. pp. 13-14) alleges that the rights of the bankrupt were as-

signed to the corporate plaintiff in the Superior Court action. This allegation was *admitted* by appellants' failure to deny the same in their answer. (T.R. pp. 22-30.) This same allegation is set forth in appellee's petition for order disallowing claim and for judgment for affirmative relief (T.R. p. 32), but adds that the assignment was "without any consideration whatsoever" and that said claim "is a valuable asset of the estate of said bankrupt copartnership".

> "That prior to the bankrupt(cy) partnership, Snow Camp Logging Company, *without any consideration whatsoever,* assigned its claim against the aforesaid defendants to Snow Camp Logging Co., a corporation, and said claim is a valuable asset of the estate of said bankrupt copartnership, Snow Camp Logging Company;"

The italicized portion of the allegation was asserted here for the first time and with which appellants took issue. (T.R. p. 42, paragraphs IV and VI.) Thus appellee, as the party asserting and seeking a recovery under this allegation, bore the burden of proving it.

Dept. of Water and Power v. Anderson, (9th Cir.) 95 F. 2d, 577;

Howells State Bank v. Novotney, (8th Cir.) 231 F. 2d, 259.

This applies to special defenses, counterclaims and cross-complaints.

New York Life Ins. Co. v. Rogers, (9th Cir.) 126 F. 2d, 784;

Allis-Chalmers Mfg. Co. v. U. S., 79 Ct. Cl., 453.

There is not one word of evidence, oral or documentary, in the entire record, that was even offered on this subject during the entire trial. There is absolutely nothing in the entire record to negate, qualify or explain the admitted fact that, *prior* to the filing of the petition in bankruptcy, the bankrupt had assigned its rights in the contract (T.R. p. 90) to Snow Camp Logging Company, *a corporation,* the plaintiff in the Superior Court proceedings. Appellee did not offer one word in support of its allegation that the assignment was without consideration and/or that the bankrupt was the owner of the rights under the contract at issue, nor did he offer any evidence, oral or documentary, of any reassignment of the contract.

The District Court in discussing the point made above said in its memorandum and order (T.R. p. 74):

> "A specific finding of the Referee on this point (Referee's Finding of Fact No. 19 reads: 'that at the time of the filing of the petition in bankruptcy herein, said bankrupts owned the rights and property in and to said writing * * *') is attacked on the ground that there is not one scintilla of evidence, either oral or documentary, to support that determination. This fact is without foundation. The only record before this court is the transcript of the proceedings had to determine which party breached the contract, and the extent of the damages. *The issue of ownership was decided adversely to petitioner before that time.* Lacking a coherent statement of facts by either party, it is impossible to determine the exact course of events which surrounded the Referee's conclusions that the contract did, in fact, constitute an asset of the bankrupt estate."

There is no support whatever in the record for the statement italicized above. It was in this very proceeding between appellee and appellants that this issue was, for the first time, decided adversely to appellants (Referee's Finding No. 19, T.R. p. 52) and without any supporting evidence.

It will be borne in mind that the complaint in the Humboldt County state court action alleged that there had been assignment of the Peters contract from the bankrupt co-partnership to a non-bankrupt corporation. It will also be recalled that the petition of the trustee of the bankrupt co-partnership alleged "that prior to the bankruptcy partnership Snow Camp Logging Company without any consideration whatsoever assigned its claim against the aforesaid defendants to Snow Camp Logging Company, a corporation, and said claim is a valuable asset of the estate of said bankrupt co-partnership Snow Camp Logging Company." Aside from the fact that there was no effort made to make any proof of the foregoing allegation in the petition of the trustee for an order to show cause either orally or in documentary form, it is respectfully submitted that it is the law that a pleading containing an admission is admissible against the pleador in a proceeding subsequent to the one in which the pleading is filed on behalf of a stranger to the former action or a party to the former action.

White v. Mechanics Securities Corp. (1925) 269 U. S. 283, 70 L. ed. 275, 46 S. Ct. 116;

Lehigh Valley R. Co. v. Allied Machinery Co. (1921; C.C.A. 2d) 271 Fed. 900 (writ of cer-

tiorari denied in (1921) 256 U. S. 704, 65 L. ed. 1180, 41 S. Ct. 625, and writ of error dismissed in (1921) 257 U. S. 614, 66 L. ed. 398, 42 S. Ct. 93);

Nelson Bros. Coal Co. v. Perryman-Burns Coal Co. (1930; D. C.) 43 F. (2d) 564 (reversed on other grounds in (1931; D. C.) 48 F. (2d) 99).

And this is a rule not only in the courts of the United States but in courts of practically all of the States of the Union. Thus it follows that the appellants having introduced into evidence the complaint in the Humboldt County action were entitled to rely upon the undenied allegations of the complaint therein and the trustee in bankruptcy in his failure to support the allegation made in his petition for an order to show cause that the assignment was made to the corporation which is not bankrupt was invalid because of a lack of consideration, finds no support whatsoever in the record either oral or documentary.

The foregoing quotation from the memorandum and order of the district court in affirming the order, judgment and decree of the referee in bankruptcy becomes even more startling when this court becomes aware of the fact that the entire record, every word of testimony and every exhibit that was introduced before the referee was included in his certificate that went to the district court on the petition of appellant for review. There could not, therefore, have been a determination of the issue of ownership adversely to the petitioner before the beginning of the hearings before the referee. If there had been any such deter-

mination by the referee relative to the ownership of the contract, it must have been arrived at in the absence of appellants in the proceedings and must have been arrived at without any opportunity of appellants to have been heard in that regard.

Thus, as the record stood before the referee, the district judge and now before this court, it shows without dispute that this contract of June 1, 1951 was assigned before bankruptcy to Snow Camp Logging Company, a corporation, and that title to the same still remains therein. The finding of the district judge (T.R. p. 74) based on the referee's finding (T.R. p. 52) is not only without support but without any attempt having been made to support it.

IV. a. THE DISTRICT COURT ERRED IN FINDING THAT THERE WAS NO ANTICIPATORY BREACH BY THE BANKRUPT, PRIOR TO THE ALLEGED BREACH BY APPELLANTS, OF THE AGREEMENT OF JUNE 1, 1951.

Appellants' contract with appellee provided, among other things (T.R. p. 7):

> "3. That sellers agree to furnish and buyer agrees to purchase all the logs required by buyer in the operation of any or all of the mills in the Redwood Creek Ranch area."

In an endeavor to show that the bankrupt had committed an anticipatory breach of its contract, which would entitle appellants to refuse to receive his logs and to seek them elsewhere, appellants offered to prove that, during the period from July to October, 1953 ap-

pellee entered into a contract to sell to a third party a substantial amount of the logs required to be delivered to appellants under the contract. (Claimant's Exhibit A for identification, see Appendix "A" hereof.) Appellee admitted that it had entered into a contract with Western Studs to deliver 70,000 feet of logs a day (T.R. pp. 365-366):

> "Q. Did you have contracts with anybody else to sell them logs during this period of time?
>
> A. You brought that up in the deposition. I looked in my records, and *we did have.* (Italics ours.)
>
> Q. As a matter of fact, in September, 1953, you entered into a contract with Western Studs to deliver them 70,000 feet of logs a day, did you not?
>
> A. No, I don't think so. We have the contract here; let's refresh our memory.
>
> Q. You do have the contract here?
>
> A. I think we do.
>
> Mr. Hilger. We did have it. I am trying to find it for counsel.
>
> The Referee. Take a ten-minute recess.
>
> (Recess)
>
> Q. (By Mr. Goodwin). Mr. Vander Jack, counsel has handed me a document entitled 'Memorandum Agreement Between Snow Camp Logging Company and Western Studs'. When was this agreement made, sir?"

After appellee admitted the execution of the contract and produced an undated agreement, appellants tried to establish the date of the contract and to offer

the contract in evidence over objection (T.R. p. 366) the referee refused to permit the introduction of the contract (T.R. p. 379) and any testimony concerning it. The portion of the transcript (including the contract itself) relating to the offers of proof have been printed in full and may be found in Appendix "A" hereof.

Appellants testified that they informed the bankrupt early in September, 1953 that they were in full production and that appellee should refrain from delivering gang logs to anyone else and advised appellee that to continue would be a material breach of the contract which would entitle it to rescind. (Appellants' Exhibit No. 4, T.R. p. 530, See Appendix "B" hereof.)

Alderson v. Housten, 154 C 1, 96 P. 884;

Jeppi v. Brockman Holding Co., 34 C. 2d, 11; 206 P. 2d, 847;

12 Cal. Jur. 2d, 471;

Johnson v. Goldberg, 130 Cal. App. 2d 571; 279 P 2d, 131.

Notwithstanding the fact that a foundation had been established to prove that the bankrupt had committed an anticipatory breach which would excuse further performance by appellants the referee refused appellants' offer of proof so that evidence could be adduced to establish this fact. In view of the referee's subsequent findings (T.R. pp. 50-52, Findings 11-18, inc.) that the contract was breached by appellants, the

failure to permit proof of the anticipatory breach was prejudicial error.

IV. b. THERE WAS ALSO AN ACTUAL BREACH BY THE BANKRUPT.

In addition to the error committed by the Referee in refusing appellants' offer of proof as argued above, the Referee erred in misinterpreting the provisions of the contract itself. Paragraph 8 of the contract (T.R. p. 8) reads as follows:

> "8. Sellers shall have the right to sell logs of any type to other buyers of logs *until* buyer comes into full production upon that type of log. In the event buyer ceases production upon any type of log, or cuts back on production, sellers shall have the right to sell any of such logs as buyer does not require upon the open market and to other buyers." (Italics ours.)

Appellants' mill came into full production sometime around the middle of May, 1952 and there is no dispute that it was in full operation at least until September, 1953. There is some conflict in the evidence as to whether or not it continued in full operation during October, 1953 (T.R. pp. 364-365) when the delivery of the logs ceased. According to the provisions of paragraph 8, above, bankrupt had no right to sell gang logs to anyone else, and having admittedly done so, thereby breached the contract with appellants.

It must be kept in mind that this contract was to run for a period of ten years and appellants were to

be supplied from the Redwood Creek Ranch area which had a limited supply of logs. Appellants were only required to take the gang logs required for its mill production and not all the logs the bankrupt might choose to cut at any time. If this were so, bankrupt could cut the whole stand of lumber in one year and if appellants couldn't absorb it, bankrupt, under its (and the Referee's) interpretation of the contract (T.R. pp. 366-374) could sell the logs elsewhere, even if it meant that the result would render bankrupt unable to perform its obligations for delivery to appellants in the future. This was obviously not the intent of the parties nor in accordance with the language of the contract itself.

In addition to the evidence tendered by appellants in their offer of proof relating to the Western Stud agreement discussed above, Trustee's Exhibit No. 14, which consisted of 20 folders showing bankrupt's log production and sales to appellants and to others proves that bankrupt delivered gang logs to others prior to appellants' purported refusal to receive logs on October 21, 1953 and at times when appellants were admittedly in full production. This was an actual breach by the bankrupt and appellants were justified in refusing to continue under the contract. There was only approximately 250-300 million feet of lumber in bankrupt's tract (T.R. p. 383) to start with. Of this, only about 40% was suitable for appellants' operation as apparently bankrupt was selling 60% elsewhere. Thus, if bankrupt delivered to others gang logs which

were the type to be used by appellants when appellants were in full production, it would not have been in a position to comply with its contractual obligations to appellants. Hence, the sale of gang logs to others as admitted by appellee (Trustee's Exhibit No. 14), while appellants were in full production, was a breach of paragraph 8 of the agreement and it was the bankrupt and not appellants who first committed a breach of the agreement.

Not only was the contract breached by the bankrupt prior to any alleged breach thereof by appellants, but appellants' efforts to adduce evidence in support of their Proof of Claim against the bankrupt estate for $900,000.00 (T.R. pp. 3-30) were thwarted by erroneous and adverse rulings of the Referee (T.R. pp. 453-458). Here, appellants sought to introduce oral testimony as to damages sustained by them through excess costs, as a result of the failure of the bankrupt to deliver all of the gang logs as required per paragraph 8 of the contract above. The Referee's theory in sustaining these objections was that the books and records of appellants were the "best evidence". The law does not support either appellee or the Referee in his ruling in sustaining the trustee's objections to this line of testimony (T.R. p. 458). California Code of Civil Procedure, Section 1855, says in that regard:

> "There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases: . . . Five—When the original consists of numerous accounts or other documents, which cannot be examined in Court without great

loss of time, and the evidence sought from them is only the general result of the whole. . . ."

"Entries in book accounts are not the best evidence, as against the testimony of those who participated in the evidence or transactions of which the entries are the record, or the testimony of third persons who witnessed the transaction."

Cal. Jur. 2d, Vol. 18, p. 666—Evidence, Section 198 citing *Maguire v. Cunningham,* 64 C. A. 536, 222 P. 838; *Vickter v. Pan Pacific Sales Corp.,* 108 C. A. 2d 601, 239 P. 2d 463.

"Hence, witnesses having knowledge of the transactions disclosed in the entries (here, the witness S. A. Peters himself) may testify to them without the necessity of introducing the books and papers themselves."

Supra, p. 667, citing: *Webb v. Serabian,* 93 C. A. 2d 642, 209 P. 2d 436; *Argue v. Monte Regio Corp.,* 115 C. A. 575, 2 P. 2d 54.

V. a. THE DISTRICT COURT ERRED IN FINDING THAT THERE WAS NO ACCORD AND SATISFACTION BETWEEN THE BANKRUPT AND APPELLANTS AS TO THE DISPUTE CONCERNING THE AMOUNT DUE THE BANKRUPT FOR LOGS DELIVERED BETWEEN JULY AND OCTOBER, 1953.

Referee's Finding No. 10:

> "That after June 1, 1951, and prior to October 21, 1953, said bankrupts delivered logs to Peters and Timber Incorporated of California, and Peters and Timber Incorporated of California did not pay therefor the Arcata market price less $4.00 per thousand board feet as provided in said writing, although said bankrupts demanded such payments; that as a direct result of refusal to pay such price, bankrupts were damaged in the sum of $19,625.91; that at no time prior to October 21, 1953, was there any good faith dispute as to price stated in the writing, Trustee's No. 1, nor manner of computation thereunder." (T.R. pp. 49-50.)

For the period between July 15, 1953 and October 21, 1953, the Bankrupt furnished Appellants timber, invoiced the same and received payment for each and every invoice. Each payment was made by check but was for a lesser amount than the invoice. Each check was marked "payment in full is hereby acknowledged for all logs for the period (date) thru (date)". In the blank spaces the appropriate dates were stated. (See Trustee's Exhibits Nos. 6-12, incl. T. R. pp. 171-176 incl.) These checks were all cashed by the Bankrupt. All during this period, there were disputes between the parties as to the quality of the logs and the price (see Trustee's Exhibit No. 5) to be paid there-

for. That there were unquestionably some verbal modifications of the June 1, 1951 contract is evidenced by Trustee's Exhibit No. 4 (T. R. p. 138, see Appendix "C"). This was a letter from the Bankrupt to Appellants discussing some of the deviations from the original contract. Attached as Appendix "D" are all of the various portions of the transcript dealing with the testimony in the record relating to the disputes as to price and quality. A study of these will show that the evidence is not disputed and that this Court is entitled to make its own inferences therefrom.

Costello v. Fazio, supra;
In re Morasco, supra;
Sheldon v. Waters, supra.

The Referee's said Finding No. 10 was not based on conflicting testimony but was, in effect, a factual conclusion arrived at on undisputed testimony. This finding is wholly unsupported.

It is interesting to note that, *after* receiving payment from Appellants of the *lesser* amount only, one of the invoices, for the disputed period (July 15-31, 1953) sent by Bankrupt to Appellants (Trustee's Exhibit No. 7, T. R. p. 173) contained a statement of a "balance due" of $3,984.49 (being the difference between the price charged by Bankrupt and the amount paid by Appellants). None of the later invoices carried forward any such balance. (Trustee's Exhibits Nos. 6-12, incl., T.R. pp. 171-176.) It seems quite clear that there was here, under the law, an executed accord and satisfaction.

Williston on Contracts, Revised Edition, Vol. 6, Sec. 1856, p. 5220, has this to say on the subject matter:

> "The great weight of authority undoubtedly supports the rule that where a claim is disputed or unliquidated and a tender of a check or draft in settlement thereof is of such character as to give the creditor notice that it must be accepted 'in full discharge of his claim' or not at all, the retention and use of such check or draft constitutes an accord and satisfaction (1 C. J. S., Accord and Satisfaction, Sec. 34, p. 528) and it is immaterial that he advises that he protests against the acknowledgment of full payment (1 Am. Jur., Sec. 26, p. 228), for in such case the law permits but two alternatives, either reject or accept in accordance with the conditions. To the same effect, *Lapp-Gifford Co. v. Muscoy Water Co.,* 166 Cal. 25, 27; 134 Pac. 989, and a host of other cases."

It is submitted that Referee's Finding No. 10 is supported neither by the disputed facts nor by the law.

V. b. THE DISTRICT COURT ERRED IN THE COMPUTATION, AS WELL AS IN THE ASSESSMENT OF, THE AMOUNT OF THE DAMAGES AWARDED TO APPELLEE AGAINST APPELLANTS IN THE JUDGMENT IN QUESTION, EVEN ASSUMING A UNILATERAL BREACH OF THE AGREEMENT OF JUNE 1, 1951 BY APPELLANTS.

The total damages awarded to Appellee by the instant judgment is $674,627.47. (T.R. p. 55.) This total was computed by the Referee as follows:

$ 19,625.91—for amount invoiced by Bankrupt and not paid (discussed in V. a. above);
30,931.57—loss of truck earnings;
146,319.00—disruption of normal operating procedures;
477,750.99—future performance

Total: $674,627.47 (T.R. pp. 50-52.)

If we assume, for the purposes of argument that Appellee was entitled to damages, the Referee arrived at most of the items thereof by the wildest speculations and the amounts allowed for these items are completely unsupported by evidence.

We can understand how the Referee arrived at the sum of $19,625.91 if his Finding No. 10 (T. R. p. 49) were correct, which we do not concede as we have heretofore argued. We can also understand the basis for the Referee's computation of damages in the sum of $30,931.57 if his Finding No. 11 (T. R. p. 50) is correct.

We here point out that there is no evidence to support this award. The party claiming damages must prove the elements necessary to support an award of damages and to prove that such damage for which he seeks compensation has occurred.

Hahn v. Wilde, 211 C. 52, 293 P. 30;
Parke v. Frank, 75 Cal. 364;
Tremorli v. Austin Trailer Equip. Co., 102 C. A. 2d 464; 227 P. 2d 923;
Kowtko v. Del & Hudson R. R. Corp., 131 F. Supp. 95;

Continental Oil Co. v. Fisher Oil Co., (10th Cir.) 55 F. 2d, 14;
Louisiana Power & Light Co. v. Sutherland Specialty Co., Inc., (5th Cir.) 194 F. 2d, 586.

Appellee failed to meet this burden. Disregarding any evidence to the contrary and accepting the testimony of Clarence C. Vander Jack, one of the partners of the Bankrupt (T. R. pp. 319-321) as true (the evidence upon which the award was based) we find that the witness estimated that a truck was "supposed to earn $3,000.00 per month gross"; if his trucks had earned $3,000.00 per month gross for the 66 months involved, the earnings "would" have totalled $198,-000.00. The records of the Bankrupt showed truck earnings for this period of $93,561.42 (Trustee's Exhibit No. 18). Of the resulting loss of approximately $105,000.00 (T. R. p. 321), 30% was attributable to Appellants. This is the entire basis for the award of $30,931.57, to Appellee.

It is Appellants' contention that Appellee had to do more than show that a truck should or "would" earn $3,000.00 per month gross. He had to prove that Bankrupt had earned that or that others in a comparable operation earned $3,000.00 per month gross and that if it were not for Appellants' improper handling of its dump Bankrupt would have earned this sum. The evidence is quite to the contrary. The Bankrupt earned approximately $105,000.00 less than the $3,000.00 average per month for the period involved. Of this loss only 30% was chargeable to Appellants. Consequently, according to the Bankrupt's

own books it never earned this $3,000.00 gross monthly truck average. This evidence really indicates that the 70% of the trucking done by Bankrupt was also at a loss, and there was no showing that the trucking done by Bankrupt for its other customers and/or its own account grossed an average of $3,000.00 per month, nor was it shown that the 70% operation of Bankrupt did not cause the total loss of earnings ($105,000.00).

The $198,000.00 figure was speculative, at best, and was totally unrelated and unconnected with the alleged delays caused by Appellants.

How the balance of the damages computations ($624,069.99) was made is a complete mystery and is completely unsupported by any evidence.

The next item to be considered is the award of $146,319.00 for purported disruption of normal operating procedures (Finding No. 11, T. R. p. 50). There is nothing in the record setting forth any itemization of loss for disruption of normal operating procedures excepting the loss of truck profits for which Appellee was awarded the aforementioned sum of $30,931.57.

Appellee tendered some proof on this subject (T. R. pp. 106-111), but an objection (T. R. p. 112) to this line of testimony was sustained (T. R. p. 114). Thereafter, certain evidence was received (T. R. pp. 114-117, inc.), which would constitute the hourly cost of maintaining a crew. This total also included a portion of the trucking costs for which Appellee was awarded damages in the sum of $30,931.57. Furthermore, there is nothing in the record, either oral or documentary,

to which these figures ($146,319.00) would be related. The elements of damages must be proved with reasonable certainty by the party claiming them.

Hahn v. Wilde, supra;
Parke v. Frank, supra;
Tremorli v. Austin Trailer Equipment Co., supra;
Kowtko v. Del. & Hudson R. R. Corp., supra;
Continental Oil Co. v. Fisher Oil Co., supra;
Louisiana Power & Light Co. v. Sutherland Specialty Co., Inc., supra.

There is no evidence in the record to support the portion of the Referee's Finding No. 11 (T. R. p. 50) awarding Trustee the sum of $146,319.00 for disruption of normal operating procedures.

The Referee, in Findings Nos. 15 and 18 (T. R. pp. 51-52) found that the price structure specified in the contract between the parties gave the Bankrupt a $2.31 per 1,000 board feet price advantage; and, projecting this figure over the balance of 91 months of the contract, and assuming the purported average monthly delivery of 2,272,732 feet (Trustee's Exhibit No. 15) awarded Appellee damages in the sum of $477,750.99 (T. R. p. 52). Not only is the evidence entirely lacking in support of this preposterous amount, but it is also based on an erroneous mathematical computation which would substantially reduce this award, if any award were justified.

The Referee took the summary of deliveries (Trustee's Exhibit No. 15) for the period January 1,

1953 through September 30, 1953 (9 months) and divided it by 8 instead of 9 to arrive at the average monthly delivery. The period from January 1, through September 30, 1953 is a full 9 months. The difference between the monthly average taken by the Referee (2,272,732 ft.) and the true average (2,020,206 ft.) is 252,526 ft. per month. Project this figure over the period of 91 months (the balance of the contract period) used by the Referee and we have a difference of 22,979,866 feet at $2.31 per thousand feet. Thus, the award given to Appellee on this item alone was mathematically excessive to the extent of $53,083.49.

Forgetting the mathematical error for the time being, it is respectfully pointed out that there is no evidence to support the award had it been correctly calculated. Again it must be pointed out that the party claiming damages must prove them with reasonable certainty and there must be proof that the damage for which Trustee seeks compensation has occurred.

Hahn v. Wilde, supra;
Parke v. Frank, supra;
Tremorli v. Austin Trailer Equipment Co., supra;
Kowtko v. Del. & Hudson R. R. Corp., supra;
Continental Oil Co. v. Fisher Oil Co., supra;
Louisiana Power & Light Co. v. Sutherland Specialty Co., Inc., supra;
Sapp v. Barenfeld, 34 C. 2d 575; 212 P. 2d, 233.

The testimony of Clarence C. Vander Jack, one of the partners of Bankrupt, was to the effect that the

maximum timber on the property owned by the Bankrupt and from which the shipments were to be made was 250-300 million feet (T. R. p. 383) at the time Bankrupt commenced to log it in 1951. When the Bankrupt ceased delivering logs to Appellants approximately 100 million feet had already been logged (T. R. p. 383). The maximum timber Bankrupt could thereafter supply to Appellants was 200 million feet, *providing all of the timber remaining was delivered to Appellants.* However, it is undisputed that Appellants only received 40% of Bankrupt's output of logs. (T. R. p. 312.) Therefore, the maximum amount of damages Appellee could recover would be $2.31 times 80 million feet (40% of the total remaining timber), or $184,800.00, *not* $477,750.99.

The Referee's computation was based upon the erroneous assumption that the Bankrupt's supply of lumber was inexhaustible and that out of 200 million feet remaining (only 40% of which, or 80 million feet, would have been delivered to Appellants) an average of 2,272,732 feet per month for the full 91 months remaining under the contract should have been delivered (a total of 206,091,612 ft.). As a result, the conclusion based on untrue and non-existing premises is mythical, unsound and unreasonable. There is no evidence in the record supporting this award even had not the mathematical calculation been incorrect as hereinabove demonstrated.

In addition to the figures above mentioned, Appellants offered to prove that the Bankrupts entered into a contract with Western Studs to deliver 70,000 feet

of logs per day, commencing October 1, 1953 (T. R. p. 379). This offer of proof was rejected (T. R. p. 383) erroneously, as we have already argued herein; but the Bankrupts had admitted the execution of this contract (T. R. p. 365). Thus, the Bankrupts admitted an agreement to deliver additional logs to others and its Trustee was compensated in the award for damages for the very logs Bankrupts was to be paid for by that third party. So, here, too, Appellee was compensated twice, just as he was in the computation of the loss of truck profits which appear to be included in the award of $146,319.00 mentioned above.

It is respectfully submitted that the damages awarded in this matter were not only unproven and deeply speculative, but have been erroneously computed.

CONCLUSION.

We believe that we have successfully demonstrated that the Memorandum and Order of the District Judge made on October 30, 1958 affirming the "Order, Judgment and Decree" of the Referee in Bankruptcy dated March 25, 1958 should be, by this Court, reversed, with appropriate directions to the District Court.

Dated, San Francisco, California,
June 22, 1959.

Respectfully submitted,
ARTHUR P. SHAPRO,
HUBER & GOODWIN,
L. W. WRIXON,
CHARLES M. STARK,
PAUL W. McCOMISH,
By CHARLES M. STARK,
Attorneys for Appellants.

(Appendices "A", "B", "C", "D" and "E" Follow.)

Appendices.

Appendix "A"

Transcript of Record Pages 379-383.

(Testimony of Clarence C. Vander Jack.)

The Referee: We have to stop somewhere. The objection is sustained.

Mr. Goodwin: If your Honor please, with all due respect, in view of the Court's ruling, I would like to make an offer of proof, if I may. The offer is to introduce in evidence a document that reads as follows (reading):

"Memorandum of Agreement

"This is a memorandum of agreement between Snow Camp Logging Company and Western Studs.

"Snow Camp Logging Company agrees to supply and Western Studs agrees to receive one (1) shift of logs per day (approximately 70,000 board feet) beginning October 1, 1953, and continuing until such time as Western Studs begins to cut their cold deck in the early part of 1954, or until July 1, 1954, whichever is earlier.

"It is agreed that the logs will be sealed by Western Studs unless there is a disagreement as to the scale, in which event they will be scaled by the Northern California Scaling & Grading Bureau and each party will bear fifty per cent (50%) of the cost thereof.

"The grade of logs to be delivered will be an average of fifteen per cent (15%) or less deductions over an average two weeks.

"It is agreed that as long as Western Studs is operating and producing lumber and Snow Camp Logging Company is operating and producing logs, that this agreement will be effective and of first consideration of either party.

"In the event that either party discontinues operation as a result of market or weather conditions, the provisions of this agreement shall be suspended for so long as the operations of either or both parties is suspended.

"The price to be paid for the logs f.o.b. pond of Western Studs in Arcata, will be a price in relation to the market price of 10/15% No. 3 Btr studs as in the attached addenda.

"The market price of studs shall be determined by the price quoted for 10/15% No. 3 & Btr studs in the 'Random Lengths' as published weekly by Lumbermen's Buying Service in Eugene, Oregon, or by mutual agreement.

"Dated:

"Western Studs,
"By F. H. Baker.
"Snow Camp Logging Company,
By Clarence C. Vander Jack, Ptr."

And attached to the document is an addenda.

Mr. Hilger: We will stipulate the reporter can copy that without reading it.

Mr. Goodwin: Fine.

(The addenda to the above agreement, in words and figures, is as follows, to-wit:

"Market Price 10/15% No. 3 & Btr Studs F.O.B. cars	Price of 15% or less Deduction logs F.O.B. Pond of Western Studs, Arcata
$ 40.00	$25.00
41.00	25.50
42.00	26.00
43.00	26.50
44.00	27.00
45.00	27.50
46.00	28.00
47.00	28.50
48.00	29.00
49.00	29.50
50.00	30.00
51.00	31.00
52.00	32.00
53.00	33.00
54.00	34.00
55.00	35.00
56.00	36.00
57.00	37.00
58.00	38.00
59.00	39.00
60.00	40.00
61.00	40.50
62.00	41.00
63.00	41.50
64.00	42.00
65.00	42.50
66.00	43.00
67.00	43.50

"Market Price 10/15% No. 3 & Btr Studs F.O.B. cars	Price of 15% or less Deduction logs F.O.B. Pond of Western Studs, Arcata
68.00	44.00
69.00	44.50
70.00	45.00
71.00	45.50
72.00	46.00
73.00	46.50

C. C. V. J.,
F. H. B.)"

Mr. Goodwin: We make an offer to prove such an agreement was executed by Snow Camp Logging Company in about the fall of 1953.

The Referee: Very well. The offer will be denied, and I will mark this as Claimant's A for identification.

(The Memorandum of Agreement and Addenda referred to was marked Claimant's Exhibit A for identification.)

Mr. Goodwin: Along the same line, your Honor, I would like to further offer to prove—that is, to prove by the testimony of this witness, Mr. Vander Jack—that between the period from October 1, 1953, to July 1, 1954, Mr. Vander Jack, or Snow Camp Logging Company, did deliver, from the timber that is involved in this matter, to Western Studs, near Arcata, California, at least 70,000 feet a day of logs.

The Referee: The offer will be denied. You have it in the record.

Mr. Goodwin: Thank you, your Honor.

Appendix "B"

Timber Incorporated of California
Manufacturers
West Coast Forest Products
P. O. Box 307, Arcata, California

September 12, 1953

Snow Camp Logging Co.
P. O. Box 607
Arcata, California

Gentlemen:

You are hereby notified that the undersigned, Timber Incorporated of California, is and has been for a period of some time in full production with reference to gang logs. Therefore, in accordance with Section 8 of our Agreement, dated June 1, 1951, you are hereby notified to discontinue the selling of gang logs to any person, firm or corporation other than the undersigned.

We herewith demand that you discontinue this practice immediately and wish to advise you that in the event you fail, neglect or refuse to comply with this demand and with the said Section 8 of our said Agreement, we will regard such action on your part as a willful, substantial and material breach of our said contract, and will assert that such action will immediately give us the right of rescission of said contract, together with other rights and remedies prescribed by said contract and afforded us by law.

We further wish to advise you that in such event we will assert fully all of our said rights.

Very truly yours,
Timber Incorporated of California
By /s/ S. A. Peters, Jr.,
President

Endorsed: Claimant's No. 4, 1-21/57, BJW,
R

Appendix "C"

P.O. Box 607
August 10, 1953

Timber Inc.
P. O. Box 307
Arcata, California

Attention Mr. Peters

Dear Mr. Peters:

Your letter of August 10, 1953 has been received and read.

Regarding our conversation of July 13, 1953, I'm sure you will recall that we talked in regard to logs that were to be cold-decked and not logs delivered to your pond. We agreed that, when you started to coldeck all logs going into the deck would be paid for at the $36.00 M rate. I did not agree nor was it my intention to agree to the $36.00 M rate for any logs being currently out or out during the coldecking operation. Furthermore, you agreed that during the cutting of logs from the deck should the price of lumber rise to a point to be agreed upon jointly, we would be reimbursed to the extent of the $2.00 drop in price allowed you for coldecking.

Again on July 31, 1953 you asked that we drop the price to $35.00 if you coldecked and I agreed to do so, and you agreed again to reimburse to the extent of present market value of the logs coldecked. We did not discuss a $35.00 price for logs being currently milled nor would I have agreed to it had the subject

been mentioned. Here, as before our conversation and agreement covered only coldecked logs.

You will also recall that the price was based upon a total of 6,000,000 feet which you agreed to deck. Thus far you have not coldecked any logs whatsoever and yet have underpaid us on 1,475,320 feet to the extent of $3,730.92. We ask that this deficit be made-up promptly.

You also owe us $253.57 representing clerical expenses of this office and that of the Humboldt Bay Scaling Bureau. This to we should like to receive.

Regarding the logs of 34″ or over which you say we dumped 200,000 feet of in July, we would be very happy to take them back at the price you paid us, if they are troublesome to you.

I shall be only too happy to discuss this with you personally, if you will call me.

Very truly yours,
Snow Camp Logging Company
By.....
C. C. VanderJack

Endorsed: Trustee's "A" for identification 11-7-56 BJW R
Trustee's No. 4 11-7-56 BJW

Appendix "D"

Transcript of Record, Pages 129-145:

Q. Now, then, beginning with July or August of 1953, you began the practice of recomputing the invoices sent to you by Snow Camp Logging Company for these logs, did you not?

A. That is right. Maybe that is the letter you refer to.

Q. I will let you know when I refer to a letter. (Testimony of S.A. Peters)

Do you recall how much you revised or corrected the invoice?

A. I think it was $2, back to $34.

Q. $2 per thousand feet?

A. $2, yes.

Q. Thereafter and in August, you made further adjustments to the invoices that were sent you by Snow Camp Logging Company, did you not?

A. That is right.

Q. Do you recall what those further reductions were?

A. They were all $2, I believe.

Q. What was the condition of the market for logs from July 1, 1953, compared to September of 1953? Do you recall?

Mr. Stark. Just a minute. Will you read that question?

(Question read by the reporter.)

Mr. Stark. Objected to on the ground that it calls for the conclusion of the witness. No foundation has been laid that he knows anything about the market for logs.

Mr. Hilger. I will apologize, counsel.

Q. Did you know anything about the market price of logs in the area at that time?

A. Yes, I did.

Q. All right. Would you then tell me from your knowledge what the market for logs was in July of 1953?

A. I cannot tell you offhand approximately what it was now. Probably around $36 to $38 for No. 2 saw logs.

Q. Then, for the same type logs in September and October, 1953, what would the price be?

A. Read that again, please.

(Question read by the reporter.)

Mr. Stark. That is for No. 2 logs, counsel?

The Witness. For No. 2 logs?

Q. (By Mr. Hilger): The same type of logs that you were quoting the price on a minute ago.

A. About $34, $32 to $34 for No. 2s.

Q. In other words, in your opinion it was $6 lower in October than it was in July? I believe you stated about $38 in July.

A. The logs did drop off. The market went down. The lumber market went down, the price of logs went down.

Q. All right. You stated that you adjusted these invoices sent to you by Snow Camp Logging Company at the rate of $2 per thousand downward in each case from their price?

A. I don't recall whether he billed us at $38 or billed us at $36. Whatever I took off was agreed upon between Mr. Vander Jack and myself at the time.

That is the reason I wrote the letter confirming it to him.

Q. That was in writing?

A. Yes, I wrote him two or three letters.

Q. Did he write you any letters agreeing to it?

A. I don't recall whether he did or not, but he agreed to it.

Q. I am asking you if there was any statement in writing from Mr. Vander Jack or any one in his organization concerning these prices?

A. That, I cannot say. I don't know whether he write me a letter or not. I doubt very much that he did.

Q. I am going to show you a letter, a copy of a letter rather, from Snow Camp Logging Company addressed to Timber, Inc., attention Mr. Peters, dated August 10, 1953, and ask you if you did not receive the original of that?

A. Yes, I received the original of that letter.

Q. Is this the letter that you relied upon to establish the agreement as you have said for the reduction in log price?

A. No, we established that verbally.

Q. Then, it was not in writing?

A. I confirmed it in writing.

Q. There was no agreement in writing, however?

A. No.

Q. Subsequent to the initial adjustment that was made on the Snow Camp Logging Company's invoices, you made adjustments on others, or subsequent invoices after the first ones. Is that correct?

A. After when?

Q. I believe you stated that the first invoice of Snow Camp Logging Company on which you made an adjustment was for logs delivered from July 16 to July 31. Now, were invoices received from Snow Camp Logging Company for logs delivered subsequent to that date?

A. That is right.

Q. That is 1953. Did you make adjustments to those?

A. I did.

Q. Do you recall at what rate the adjustment was made?

A. It was reduced to $34. That was the price we agreed upon.

Q. Who agreed upon?

A. Mr. Vander Jack and myself.

Q. How, in writing?

A. No, verbally.

Q. All of the reductions were to $34 from beginning to end?

A. No, just that period.

Q. Well, July 15 to October?

A. That is right.

Q. Why did you make this reduction?

A. We agreed upon it.

Q. Who agreed upon it?

A. Mr. Vander Jack and myself.

Q. In writing?

A. No, I told you not. It was verbal.

Q. And you received this letter dated August 10?

A. I received that, yes.

Q. You received it on or about the time it bears date, when this transaction was moving forward?

A. I presume I did.

Mr. Stark. What is the date of the letter?

Mr. Hilger: August 10. Do you have the original in your file?

Mr. Goodwin. I don't know, Mr. Hilger. I will look and see.

Q. (By Mr. Hilger). I will show you, Mr. Peters, a recap, referring only to the items above "Miscellaneous" here, leaving this out for the moment. Below "Miscellaneous" would that recap be an accurate tabulation of the logs delivered by Snow Camp Logging Company during the period July, August and September as indicated?

Mr. Stark. Just a second, Mr. Peters. Is the question confined to the footage as distinguished from price?

Q. (By Mr. Hilger). That is the footage?

A. I don't know. It could be approximately correct.

Q. It would be at least approximately correct?

A. Yes.

Q. And it was to those footages that you applied your correction?

A. That is correct.

Q. Directing your attention to the columns "Per billing" and "Amount Paid," would those two items be correct?

A. Well, I presume they are, without looking at my own records.

Q. Would you say they were correct?

A. I won't confirm it now, but I assume they are.

Q. All above the amount paid is listed under July as $36; Under August $35.

A. That is right.

Q. September is $34. I think you testified the agreement was those were all to be paid for at the rate of $34, this verbal agreement you alluded to. Is it a correct statement that you came to that verbal agreement at $34 throughout that period?

A. I was under the impression that is what it was. I could be mistaken.

Q. You don't really recall what the agreement was?

A. Yes, I do.

Q. Well, what was it?

A. Well, do you want me to refer to my letters?

Q. I just want to know if you recall. You have alluded to a verbal agreement. I want to know just what you contend that verbal agreement was, what your recollection is?

A. If this is what I paid on, this is what was agreed on.

Q. You don't recall what was agreed on?

A. That is it.

Q. What is it?

A. The price that we paid.

Q. What was your agreement?

Mr. Goodwin. Your Honor, I am going to object to the repetitious asking of the same question. It has been asked and answered several times.

The Referee. And, answered differently.

Mr. Goodwin. That is correct, Your Honor, but he has testified that his recollection was $34. But, in any event, whatever he paid, he said the amounts had been agreed upon.

The Referee. Counsel wants to know what that was.

Mr. Hilger. I want to know what the witness' independent recollection was of the agreement, if any there was.

The Referee. The objection is overruled.

A. I don't say that is what it was. That was agreed upon, the figure in here.

Q. (By Mr. Hilger). What was the agreement?

A. $36 for the last half of July; $35 for August, and $34 from then on.

Q. Now, I am going to show you a letter dated September 14, 1953, rather, a copy of a letter from Snow Camp Logging Company to S. A. Peters and ask you to read that.

A. I think we received that letter, or this letter, a copy of it.

Mr. Hilger. In order to preserve the record, I am going to ask that the letter dated August 10, to which the witness has referred, be marked at this time; and the letter dated September 14, to which the witness just referred, consisting of two pages, be marked for identification.

Mr. Stark. Which letter of August 10?

Mr. Hilger. The one the witness identified as having been received by him.

The Referee. The copy of the letter.

Mr. Stark. Is that the document, Your Honor, that in the second paragraph refers to the Red Robin Cafe?

The Referee. The second paragraph?

Mr. Stark. Yes.

The Referee. I don't see anything about that.

Mr. Hilger. That is a letter from Mr. Vander Jack to Mr. Peters.

Mr. Stark. The one I am talking about is from Mr. Peters to Snow Camp Logging Company.

The Referee. That is the other letter dated September 14. That will be Trustee's B for identification.

(Letter of August 10, 1953, Trustee's Exhibit A for Iden.)

(The letter dated September 14, 1953, was marked Trustee's Exhibit B for identification.)

Q. (By Mr. Hilger). I am going to show you a letter on the letterhead of Timber, Inc., of California.

Mr. Stark. May I see it, counsel?

Mr. Hilger. I think you had it before.

Q. Dated August 10. Did you send that letter out?

A. I did.

Q. I will show you a letter dated September 10, 1953, on the letterhead of Timber, Inc., of California.

Mr. Goodwin. May we see that, counsel?

Mr. Hilger. I am sorry. I thought you had a copy.

Mr. Stark. We have no objection to the introduction of that letter.

Q. (By Mr. Hilger). I am directing your attention to the letter of August 10, 1953, from you to Snow Camp Logging Company, not the letter which we have introduced into evidence.

Mr. Stark. I don't understand that letter being in evidence.

Mr. Hilger. The one marked for identification.

Mr. Stark. That is the one you had in your hand a minute ago, I believe, Judge.

Mr. Hilger. At this time I will offer in evidence these two exhibits, unless counsel for the other side wish to substitute the originals.

Mr. Goodwin. I don't think I have them, as I told you, Mr. Hilger.

Mr. Hilger. This witness has testified he received them.

The Referee. No objection? Trustee's Exhibit A will become Trustee's Exhibit No. 4 in evidence.

(The document heretofore marked Trustee's Exhibit A for identification was received in evidence as Trustee's Exhibit No. 4)

The Referee. Trustee's B for identification will become Trustee's 5 in evidence.

(The document heretofore marked Trustee's Exhibit B for identification was received in evidence as Trustee's Exhibit No. 5)

Mr. Stark. Is there a question pending?

Mr. Hilger. Not yet.

The Referee. Go ahead.

Q. (By Mr. Hilger). Now, looking at your letter dated August 10 to Snow Camp Logging Company, you, in that letter in the first paragraph, indicate the intention of paying $36 for deliveries during the last half of July.

A. That is what it says.

Q. You indicate in the second paragraph the intention of paying $35 for deliveries during the first of August. Is that correct?

A. Yes.

Q. Now, there is nothing in that letter about paying $34 for deliveries after the middle of August, is there?

A. No. You will find another letter.

Q. I think you testified, however, that your agreement back in July was for $36 in July, $35 in August, and $34 thereafter. Didn't you so testify?

A. Well, I don't recall just when we did start the $34, but it must have been in August.

Q. There is no reference to any agreement made to that effect in the letter dated August 10 directed to Snow Camp Logging Company, is there?

A. Well, there is another letter besides that.

Q. There is no reference in that letter, is there?

Mr. Stark. Counsel, the letter speaks for itself. The Referee can read. Why don't you offer it in evidence?

Mr. Hilger. I just asked him to read his letter and asked if there is any reference in there to the $34.

The Witness. No, there is not.

Q. (By Mr. Hilger). Now, by this letter, did you intend to set forth what your understanding of this conference was in July?

Mr. Goodwin. Objected to as calling for the opinion and conclusion of the witness.

Mr. Hilger. He can certainly testify what his intention was.

The Referee. Doesn't the letter speak for itself?

Mr. Goodwin. The letter speaks for itself.

Mr. Hilger. The letter contains certain factual information. I just want to know if it was the intention of this witness that this letter constituted his version.

The Referee. It calls for his opinion and conclusion of what the letter contains.

Mr. Stark. Your Honor can read; you can draw your own conclusion of what it says.

Mr. Hilger. I know you fellows would like me to offer this, but I am not going to.

Mr. Stark. We can introduce it.

Mr. Hilger. Are you going to?

Mr. Stark. When the time comes, we will, and we will have some shocking information for you.

Q. (By Mr. Hilger). I show you a letter dated September 10, 1953.

The Referee. Is that September 10 or 14?

Mr. Hilger. September 10, from Timber, Inc., to Snow Camp Logging Company, not the one in evidence.

The Witness. Yes, I read it.

Q. (By Mr. Hilger). Directing your attention to the third paragraph there, you allege and state in that that you are computing payment on a formula involving grading of logs.

A. That is what it calls for.

Q. There was nothing in any previous correspondence referring to that formula, was there?

A. No, there was not.

Q. Referring again to this tabulation as to footages delivered between July 16 and September 30, it

would appear there were approximately 5,136,000 feet of logs delivered in that period of time.

A. That is what the letter says.

Q. That would be approximately correct, would it not, compared to the production of your mill?

A. I would say it was.

Q. You assume it would be?

A. I assume it would be, yes.

Q. You made an adjustment of $2 per thousand or $3 per thousand on all those deliveries during that period, revising the invoices downward from those received?

A. It starts with $2, I think, and then three. Then we get down here to one and three.

Q. The difference between the Snow Camp Logging Company's billing price and the amount you paid was $12,861?

A. I don't know what the figures say.

Q. Would that be approximately correct from your own knowledge of the operation?

A. I don't know. I cannot tell without looking at my own records.

Mr. Stark. Mr. Hilger, do I understand correctly? Is it your contention on behalf of the Trustee that the reduction in price, whatever price it might be or whenever it occurred, was unauthorized, first, and was not acceptable to your predecessor in interest, Snow Camp Logging Company?

Mr. Hilger. We make the contention that it was an outright departure from the contract, unauthorized by any one.

Mr. Stark. Unacceptable to you?

Mr. Hilger. Unacceptable to us at the time, and that is our contention in introducing it.

Mr. Stark. I just want to get that firmly in my mind.

Q. (By Mr. Hilger). Now, you signed checks to Snow Camp Logging Company, covering the log payments as you had computed them, did you not?

A. That is right.

Q. Did you ever send checks to them, make payments to them, beyond your computation as you had reduced it?

A. Only what we agreed upon.

Q. To get at it again: You reduced by $2 per thousand or more the invoices for logs sent to you by Snow Camp Logging Company during the period of July and thereafter through October. Is that correct?

A. No, I think according to your own figures there was just a dollar off a couple of times. I would have to look at my own records to tell you exactly what we did.

Q. In any event, you did reduce them to some extent?

A. That is right; we did.

Q. And you sent checks in the amounts as you computed them during that period?

A. That is right.

Q. And you have never made any payments beyond those payments as you computed it?

A. That is correct.

Q. Your computations and payments were less than the invoices received from Snow Camp Logging Company during that period of time?

A. They are.

Q. Now, you have stated that the reason you reduced these prices was because of some agreement. Is that correct?

A. Right.

Q. I assume from that then, it was not because of any analysis on your part of the Arcata market?

Mr. Stark. Oh, he has testified it was pursuant to an agreement between himself and Snow Camp.

Mr. Hilger. I want a definite statement of whether he did or did not refer to the Arcata market in computing the revision.

Mr. Stark. We will let him answer without objection.

The Referee. Go ahead; answer.

The Witness. Yes, we referred to the Arcata market. You want to remember, there was gradings done then, 2s and 3s.

Q. (By Mr. Hilger). Did you make revisions pursuant to the alleged agreement or did you make them by reference to the Arcata market?

A. That was the basis on which we made it.

Q. What was?

A. The Arcata price.

Q. Then, it was not pursuant to an agreement?

A. Yes, it was. We agreed upon the amount it was going to be reduced. We were buying logs ranch run.

Mr. Stark. Would you explain that to His Honor?

A. In that kind of log, it can be any type of log. It can be a 3, it can be a 2, or better.

The Referee. Just run of the mill?

The Witness. That is right. But we were getting such terrific volumes of No. 3 and culls, we had to reduce the price.

Q. (By Mr. Hilger). What was the reason, because of the poor market, poor logs, or the agreement with Mr. Vander Jack? What was the reason?

Mr. Stark. I submit, your Honor, he said there were three reasons: the fact that he was not getting as run-of-the-mill quality of log that he was entitled to; the fact that the Arcata market was less than the $34 price; and the fact that he agreed with Snow Camp as to the reduction.

Mr. Hilger. He has testified at first that it was pursuant to some agreement that was in writing; then, he changed it now that it was verbal.

Mr. Goodwin. No, he did not.

Mr. Hilger. Then, I asked if he did it pursuant to agreement or reference to the Arcata market and he said pursuant to the Arcata market and by agreement. Then, because of the poor quality of logs being received. I think we are entitled to know if there was any definite basis or reason for his reduction or an arbitrary departure from the terms of the written contract.

The Referee. Isn't that for the Court to determine from the testimony as given, which he has given, as

Mr. Stark says, in three different ways? Whether the three different ways was the reason or not, wasn't that the method?

Mr. Stark. The three different reasons culminated in the agreement, we said.

Mr. Hilger. Under the contract, I believe the Court here is bound to determine only one method. I wish to determine whether that method existed and if not, if that was a departure and breach of the contract.

The Referee. If that is your contention here, are you being hurt any by what was said already?

Mr. Hilger. We will pass it.

Mr. Stark. There is such a thing as an oral modification of a written contract.

Transcript of Record, Pages 353-354:

Q. You also testified that before you left you were not being paid as you billed. You mean by that, don't you, that you were not being paid the amount that you billed Timber, Inc.?

A. That is what I mean.

Q. You were being punctually paid on paydays, were you not?

A. I was.

Q. You were also being paid on Mr. Montgomery's scale?

A. Correct.

Q. So the difference was simply one where you billed a certain amount per thousand and got paid a lesser amount per thousand?

A. That is right.

Q. Now, in that regard you have seen, have you not, the cancelled checks, or photostatic copies, that are in evidence covering this period of dispute between you and Mr. Peters?

A. I received all the checks, but I had to cash them along with the notation on them, because I needed the money.

Q. Those endorsements of Snow Camp on the various checks are your own?

A. Are Snow Camp's endorsement.

(Testimony of Clarence C. Vander Jack).

Q. You deposited the checks and used the proceeds, is that right?

A. We did.

Q. And the notations were on the checks, "Full Payment"?

A. They were on there, but I also sent letters covering that. We did object to them.

Q. I understand that. This was during the time the dispute was going back and forth between you and Mr. Peters as to the price?

A. That is right.

Q. By the way, that dispute as to price started when, around July or August?

A. I think it started in July. We could easily see. That has been submitted here.

Q. It went through clear until the time you quit delivering logs?

A. That is right.

Appendix "E"

TABLE OF EXHIBITS (Rule 18 – 2.(f))

Trustee's Exhibits

Claimant's Exhibits